Office-Supreme Court, U.S.
FILED
AUG 19 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES EDGAR,

Appellant,

v.

MITE CORPORATION AND MITE HOLDINGS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR APPELLEES

RICHARD W. HULBERT
One State Street Plaza
New York, New York 10004
(212) 344-0600
Attorney for Appellees

CHRISTOPHER H. LUNDING
RICHARD L. GELFOND
CLEARY, GOTTLIEB, STEEN & HAMILTON
One State Street Plaza
New York, New York 10004
Of Counsel

QUESTIONS PRESENTED

Whether this appeal is moot.

Whether the Illinois Business Take-Over Act is unconstitutional under the Commerce and Supremacy Clauses.

INDEX

	PAGE
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
ARGUMENT:	
I. This Appeal Presents No Case Or Controversy And Should Be Dismissed As Moot	7
A. Penalties may not be imposed for action taken under the protection of a federal court injunction.	9
B. Due Process considerations preclude the imposition of criminal or civil penalties for action taken in reliance on judicial pronouncements as to the validity of state statutes.	11
II. The Illinois Act Is Unconstitutional Under The Commerce Clause	12
A. The Illinois Act is not evenhanded.	14
B. The effect of the Illinois Act on interstate commerce is not "incidental" but, on the contrary, significant and purposeful.	15
C. The effect on interstate commerce is adverse.	16
D. The constitutionality of Blue Sky laws and the accommodation of federal securities regulation with Blue Sky laws does not sustain the Illinois Act.	18
E. The Illinois Act cannot be sustained as merely a regulation of the internal affairs of a corporation.	20

PAGE

F. The Illinois Act constitutes a scheme for national regulation of tender offers in competition with that enacted by Congress. 23

III. The Illinois Act Is Preempted By The Williams Act 24

A. The Williams Act protects investors through a market approach. 25

B. The Illinois Act's regulatory approach conflicts with the Williams Act. 27

C. The Williams Act preempts the Illinois Act. 29

CONCLUSION 34

CITATIONS

Cases:

Baldwin v. *Seelig, Inc.*, 294 U.S. 511 (1935) 16,23n

Brown v. *Chote*, 411 U.S. 452 (1973) 9

Caldwell v. *Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917) 19n

Canadian Pacific Enterprises (U.S.) Inc. v. *Krouse*, 506 F. Supp. 1192 (S.D. Ohio Jan. 13, 1981), *appeal pending*, No. 81-3083 (6th Cir. 1981) 28n

Chicago Rivet and Machine Co. v. *Penn. Sec. Comm'n*, No. 211 C.D. 1979 (Commw. Ct. Feb. 8, 1979) 4n

Cox v. *Louisiana*, 379 U.S. 559 (1965) 11

Crane Co. v. *Lam*, 509 F. Supp. 1182 (E.D. Pa. 1981) 17n,28n

PAGE

Daylin, Inc. v. *Uarco Inc.*, No. 78 C4246, Order of Preliminary Injunction (N.D. Ill. Nov. 27, 1978), *stay pending appeal denied*, Nos. 78-2487 and 78-2488 (7th Cir. Nov. 28, 1978), *stay pending appeal denied sub nom. Dixon* v. *Daylin, Inc.*, No. A-251 (S. Ct. Dec. 4, 1978) 10n

Electronic Specialty Co. v. *International Controls Corp.*, 409 F.2d 937 (2d Cir. 1969) 10-11,27

Eure v. *Grand Metropolitan Ltd.*, [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,694 (N.C. Super. Ct. April 18, 1980) 28n

Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824) 12-13,18n

Great Western United Corp. v. *Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on venue grounds sub nom. Leroy* v. *Great Western United Corp.*, 443 U.S. 173 (1979) 14-15,14n,20n,22n,25,30 32,32n

Hall v. *Geiger-Jones Co.*, 242 U.S. 539 (1917) 7,19-20

Hines v. *Davidowitz*, 312 U.S. 52 (1941) 30

Hi-Shear Ind., Inc. v. *Campbell*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,804 (D.S.C. Dec. 4, 1980) 28n

Hi-Shear Ind., Inc. v. *Neiditz*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,805 (D. Conn. Dec. 16, 1980) 28n

H.P. Hood & Sons, Inc. v. *Dumond*, 336 U.S. 525 (1949) 18n

Hughes v. *Oklahoma*, 441 U.S. 322 (1979) 18n, 22n

Hygrade Provision Co. v. *Sherman*, 266 U.S. 497 (1925) 9

Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977) 8,30,31

Joseph E. Seagram & Sons, Inc. v. *Marley*, No. 81-869-W (W.D. Okla. July 17, 1981) 28n

PAGE

Kassel v. *Consolidated Freightways Corp.*, ___ U.S. ___, 49 U.S.L.W. 4328 (March 24, 1981) 24n

Kennecott Corp. v. *Smith*, 637 F.2d 181, *after remand*, 507 F. Supp. 1206 (D. N.J.), *appeal pending*, No. 81-1679 (3d Cir. filed April 1, 1981) 14,25,26,28n,30,33

Kratz v. *Kratz*, 477 F. Supp. 463 (E.D. Pa. 1979) 12

Marks v. *United States*, 430 U.S. 188 (1977) 11

Merrick v. *N.W. Halsey & Co.*, 242 U.S. 568 (1917) .. 19n

Mite Corp. v. *Dixon*, 633 F.2d 486 (7th Cir. 1980) 2,4,5,10 10n,16n,17n,25,31

Natomas Co. v. *Bryan*, 512 F. Supp. 191 (1981) 28n

People v. *Dean*, 73 Ill. App. 3d 501, 392 N.E.2d 57 (1979) 13n

Philadelphia v. *New Jersey*, 437 U.S. 617 (1978) 6,13n

Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) 6,13n

Piper v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977) 25

Raley v. *Ohio*, 360 U.S. 423 (1959) 11

Ray v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978) 30

Roe v. *Wade*, 410 U.S. 143 (1973) 6,8,8n

Rondeau v. *Mosinee Paper Corporation*, 422 U.S. 49 (1975) 27,30

Salem Inn, Inc. v. *Frank*, 501 F.2d 18 (2d Cir. 1974), *aff'd in relevant part sub nom. Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975) 9-10

SEC v. *Medical Comm. for Human Rights*, 404 U.S. 403 (1972) 8

South Carolina State Highway Dep't v. *Barnwell Brothers, Inc.*, 303 U.S. 177 (1938) 24n

PAGE

Southern Pacific Co. v. *Arizona*, 325 U.S. 761 (1945) . 22-23, 24n

Steffel v. *Thompson*, 415 U.S. 452 (1974) 8,9

Terrace v. *Thompson*, 263 U.S. 197 (1923) 9

United States v. *Barker*, 546 F.2d 940 (D.C. Cir. 1976) 12

United States v. *Ehrlichman*, 376 F. Supp. 29 (D. D.C. 1974), *aff'd*, 546 F.2d 910 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977) 12

United States v. *Mancuso*, 139 F.2d 90 (3d Cir. 1943) 11

United States Parole Comm. v. *Geraghty*, 445 U.S. 388 (1980) 8n

Constitution, statutes, and rules:

United States Constitution:
Article I, Section 9, cl. 6 (Commerce Clause) 2,5,7,12-14, 16,17n,18-21,23,24,24n
Article VI, cl. 2 (Supremacy Clause) 2,7,17n,20n,23-25,29,31, 34,34n
Fourteenth Amendment (Due Process Clause) 8,11

Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.* 2,5
Section 14(d), 15 U.S.C. § 78n(d) 28,29n
Section 14(d)(1), 15 U.S.C. § 78n(d)(1) 25
Section 14(d)(5), 15 U.S.C. § 78n(d)(5) 26
Section 14(d)(6), 15 U.S.C. § 78n(d)(6) 26
Section 14(d)(7), 15 U.S.C. § 78n(d)(7) 27
Section 28(a), 15 U.S.C. § 78bb(a) 14,18

Williams Act, 15 U.S.C. §§ 78m (d)-(e), 78n (d)-(f) 2n,5,7,15,17n,23-34

Illinois Blue Sky Law (Ill. Rev. Stat. ch. 121½, § 137.5 (1975)) 15n,19

Federal Communications Act, 47 U.S.C. § 310 (1976) 34n

PAGE

Bank Holding Company Act, 12 U.S.C. § 1842 (1976 & Supp. II 1979) 34n

Illinois Business Take-Over Act (Ill. Rev. Stat. ch. 121½, § 137.51 *et seq.* (1979)) 2

§ 2.09(4) 5,15,29n
§ 2.10 ..... 14n
§ 4 ..... 28,29n
§ 7 ..... 15n
§ 7(A) 29
§ 7(C) 29
§ 7(D) 29
§ 7(E) 17,29
§ 9(D) 29n

Rules under Securities Exchange Act of 1934:
Rule 14d-2(b), 17 C.F.R. § 240.14d-2(b) 26n,28n
Rule 14d-7, 17 C.F.R. § 240.14d-7 ..... 26n
Rule 14d-8, 17 C.F.R. § 240.14d-8 ..... 29n
Rule 14e-1, 17 C.F.R. § 240.14e-1 ..... 26n

Pennsylvania Takeover Disclosure Law, 70 Pa. Cons. Stat. Ann. § 71 *et seq.* (Purdon Supp. 1978) 3,3n

Virginia Take-Over-Bid Disclosure Act, Va. Code 13.1-528 (Va. Acts 1968, c. 119) 20n

Miscellaneous:

E. Aranow & H. Einhorn, *Tender Offers for Corporate Control* 157 (1973) 16n

E. Aranow, H. Einhorn & G. Berlstein, *Developments in Tender Offers for Corporate Control* 231 (1977) 15n

111 Cong. Rec. 28257-59 (1965) 28n

113 Cong. Rec. 854 (1967) 30

113 Cong. Rec. 24665-66 (1967) 26n,27n

PAGE

Easterbrook & Fischel, *The Proper Role of Target's Management In Responding To A Tender Offer*, 94 Harv. L. Rev. 1161 (1981) 34n

44 Fed. Reg. 70326 (1979) 26n,28n

H. R. Rep. No. 1711, 90th Cong., 2d Sess. (1968) 27

Hearings on H. R. 4285, S. 3431 and S. 336 Before the House Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. (1970). 28n

Hearings on H. R. 14475 and S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 90th Cong., 2d Sess. (1968) 28n

Hearings on S. 510 Before the Subcomm. on Sec. of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. (1967) 28n

Langevoort, *State Tender-Offer Legislation: Interests, Effects and Political Competency*, 62 Cornell L.Q. 213 (1977) 15n,19,29n

I L. Loss, *Securities Regulation* (2nd ed. 1961) 20

Note, *Commerce Clause Limitations upon State Regulation of Tender Offers*, 47 S. Cal. L. Rev. 1133 (1974) 22n

Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 Yale L. J. 510 (1979) 16n

Note, *The Constitutionality of State Takeover Statutes: A Response to Great Western*, 53 N.Y.U. L. Rev. 872 (1978) 15n

Reese & Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 Colum. L. Rev. 1118 (1958) .. 21n

PAGE

Restatement (Second) of Conflict of Laws § 302, Comment e (1971) 21n

S. Rep. No. 550, 90th Cong., 1st Sess. (1967) 27,28n,30

Shapiro, *State Takeover Laws*, in Practicing Law Institute, Twelfth Annual Institute on Securities Regulation 401 (1980) 20n

Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Case Western Reserve L. Rev. 722 (1970) 21n

Stock Exchange Practices: *Hearings on S. Res. 84 (72d Cong.), S. Res. 56 and S. Res. 97 (73d Cong.) Before the Senate Comm. on Banking and Currency*, 73 Cong., 1st Sess. 6577 (1934) 20n

Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 Fordham L. Rev. 1 (1976) 22n

No. 80-1188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES EDGAR,

Appellant,

v.

MITE CORPORATION AND MITE HOLDINGS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

Appellees MITE Corporation and MITE Holdings, Inc. are corporations organized under the laws of Delaware with their principal executive offices in New Haven, Connecticut. (A-2a.)[1] MITE Holdings, Inc. is a wholly-owned subsidiary of MITE

[1] Citation to "A" refers to the Appendix filed with the Jurisdictional Statement. Citation to "JA" refers to the Joint Appendix filed with the appellant's brief.

Corporation (MITE Corporation and MITE Holdings, Inc. are collectively referred to as "MITE"). (A-2a.)

Appellant James Edgar is the Secretary of State of Illinois and is charged with the administration and enforcement of the Illinois Business Take-Over Act (Ill. Rev. Stat. ch. 121½, § 137.51 *et seq.* (1979)) (the "Illinois Act").

Chicago Rivet & Machine Co. ("Chicago Rivet"), one of the defendants below, but not a party to this appeal, is a corporation organized under the laws of Illinois with its principal executive offices in Bellwood, Illinois. (A-2a.) Chicago Rivet's common stock is traded on the American Stock Exchange. (JA-E-54.) Approximately 73% of Chicago Rivet's stockholders, holding approximately 56% of its stock, reside outside of Illinois. (A-33a.)

On January 19, 1979, MITE made the requisite filing with the Securities and Exchange Commission pursuant to Section 14(d)(1) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.* (the "Exchange Act") in connection with a proposed cash tender offer for any and all shares of Chicago Rivet common stock. (JA-B-2.) The proposed offer of $28.00 per share represented a premium of approximately 15% over the market price immediately prior to the announcement of the offer. (*Id.*)

On the same day, MITE commenced this litigation in the United States District Court for the Northern District of Illinois, seeking a declaratory judgment that the Illinois Act was null and void on its face and as applied to MITE's proposed tender offer and preliminary and permanent injunctive relief prohibiting then Secretary of State Alan J. Dixon ("Dixon") and Chicago Rivet from enforcing the Illinois Act against it. (A-3a.) MITE alleged that the Illinois Act violated the Supremacy and Commerce Clauses of the United States Constitution. (A-3a.) MITE expressly stated in the proposed offer that its ability to make the offer was dependent upon the issuance of injunctive relief against the Illinois Act.[2]

---

[2] The Schedule 14D-1 filed by MITE pursuant to the Williams Act amendments to the Exchange Act with the SEC on January 19, 1979, including the proposed form of offer which is Exhibit 1 thereto, is plaintiffs' exhibit 14 in the District Court record.

Chicago Rivet responded three days later by initiating litigation in the Court of Common Pleas of Blair County, Pennsylvania, seeking to enjoin MITE from proceeding with its proposed cash tender offer on the asserted ground that MITE's offer violated the Pennsylvania Takeover Disclosure Law.[3] Chicago Rivet alleged that the Pennsylvania Act applied because Chicago Rivet had its principal place of business and substantial assets in Pennsylvania. (A-3a.) The Blair County court issued an *ex parte* order on Chicago Rivet's application, enjoining MITE from proceeding with the tender offer pending a hearing. At the same time, Chicago Rivet filed a complaint with the Pennsylvania Securities Commission, alleging the same jurisdictional basis and requesting the Commission to enforce the Pennsylvania Act against MITE. (A-4a.)

Back in the Northern District of Illinois, Chicago Rivet, representing to the court that it had no present intention of invoking the Illinois Act, moved to dismiss MITE's complaint on the ground that no case or controversy existed between the parties. (A-4a.) Appellant's predecessor, Dixon, represented to the court that he had not decided whether MITE's offer should be exempt from the Illinois Act. (A-4a.) On the strength of these representations, the District Court, on January 24, 1979, adjourned proceedings on MITE's motion for a temporary restraining order and preliminary injunction and ordered that neither Chicago Rivet nor Dixon was to initiate any action against MITE under the Illinois Act without prior notice to MITE and the court. (JA-H-2.)

Meanwhile, on January 23, 1979, MITE had removed the Pennsylvania state court action to the United States District Court for the Western District of Pennsylvania and filed its own complaint in that court seeking a declaratory judgment that the Pennsylvania Act was unconstitutional and an injunction prohibiting Chicago Rivet and the Pennsylvania Securities Commission from enforcing the Pennsylvania Act against MITE's proposed tender offer. (A-4a.) On January 31, 1979, the Pennsylvania

---

[3] 70 Pa. Cons. Stat. Ann. § 71 *et seq.* (Purdon Supp. 1978) (the "Pennsylvania Act").

Securities Commission determined that it was without jurisdiction to enforce the Pennsylvania Act against MITE's proposed tender offer and on the next day the United States District Court for the Western District of Pennsylvania denied Chicago Rivet's motion for a temporary restraining order against MITE's offer. (A-35a.)

With the Pennsylvania phase of Chicago Rivet's two-front defensive battle thus brought to an unsuccessful conclusion,[4] Chicago Rivet and Dixon took immediate steps to invoke the Illinois Act. On February 1, 1979, Dixon, finding that MITE was about to violate the Illinois Act by commencing its proposed cash tender offer for Chicago Rivet without complying with the Illinois Act, ordered MITE to "cease and desist all further action to make a tender offer" for Chicago Rivet and notified MITE that this order and notice would be served on MITE on February 5, 1979. (JA-B-3.) On February 2, 1979, Chicago Rivet informed MITE that it would file suit in the Illinois state court to restrain MITE's proposed offer. (JA-B-3.)

In response, MITE renewed its request for relief against the Illinois Act. On February 2, 1979, the Illinois District Court issued a preliminary injunction restraining Dixon from enforcing the Illinois Act against MITE's tender offer for Chicago Rivet. The District Court determined that the Illinois Act was unconstitutional on its face and concluded that "the delay which will be occasioned by requiring MITE to comply with the Illinois [Act] will result in irreparable injury." (JA-I-7.) Although the order was cast as a preliminary injunction, rather than as a temporary restraining order, for the explicit purpose of assuring its immediate appealability, neither Dixon nor Chicago Rivet sought expedited review or interim relief from the Court of Appeals. (JA-I-8.)

On February 5, 1979, MITE published its tender offer in the national edition of the *Wall Street Journal*. (A-5a.) MITE's offer,

---

[4] Chicago Rivet also unsuccessfully appealed the decision of the Pennsylvania Securities Commission to the Commonwealth Court of Pennsylvania. *Chicago Rivet and Machine Co.* v. *Penn. Sec. Comm'n*, No. 211 C.D. 1979 (Commw. Ct. Feb. 8, 1979).

which represented a transaction in interstate commerce in excess of $23,000,000, was made to all of the shareholders of Chicago Rivet residing throughout the United States and elsewhere. (A-5a.) On the same day, Chicago Rivet commenced an offer for approximately 40% of its own shares at $30.00 per share (JA-E-32) without the delays associated with the Illinois Act, because of the express exemption in § 2.09(4) for an issuer's acquisition of its own stock.

The District Court entered final judgment on MITE's application on February 9, 1979, declaring the Illinois Act to be null and void because it was preempted by the Williams Act amendments to the Exchange Act, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f), and because it created an undue burden on interstate commerce in violation of the Commerce Clause. (A-32a-41a.) The District Court also permanently enjoined enforcement of the Illinois Act against MITE in connection with its proposed tender offer. The court concluded that "[d]enial of a permanent injunction against enforcement of the Illinois Act would cause Plaintiffs irreparable injury by depriving them of their federal statutory rights, by imposing on them lengthy delays and giving undue advantage to the management of the 'target company' by using these delays to frustrate the tender offer." (A-40a.)

On February 12, 1979, MITE and Chicago reached an agreement whereby both tender offers were withdrawn and MITE was given 30 days to conduct an examination of the books and affairs of Chicago Rivet. Under the agreement MITE was either to make a tender offer at $31 per share on or before March 12, 1979, which Chicago Rivet agreed not to oppose, or would be bound under paragraph 5 of the agreement not to "acquire or make any offer to acquire any stock or assets of [Chicago] Rivet or make any offer to merge, consolidate or otherwise acquire [Chicago] Rivet." On March 2, 1979, following completion of its examination, MITE advised Chicago Rivet that it would make no offer.[5]

---

[5] The agreement of February 12, 1979, being an event occurring after entry of the judgment in the District Court, is not part of the record. A copy of the agreement is set forth in Appendix A hereto.

On March 2, 1979, Dixon filed notice of appeal from the District Court judgment, which was affirmed by the Court of Appeals on October 17, 1980.

SUMMARY OF ARGUMENT

1. An actual controversy must exist at all stages of appellate review or the litigation must be dismissed as moot. *Roe* v. *Wade*, 410 U.S. 143 (1973). By agreement, MITE is precluded from ever commencing another tender offer for Chicago Rivet. The only basis for continued litigation of this case must lie in the possibility that MITE can be subjected to criminal or civil penalties for having acted in violation of the Illinois Act during a time when its enforcement had been explicitly enjoined.

If Illinois is permitted to impose civil and criminal penalties against MITE for commencing its tender offer under the protection of a federal court injunction, the injunctive relief obtained will be rendered meaningless. Moreover, subjecting MITE to penalties under these circumstances would violate well-established principles of Due Process. Because MITE cannot be proceeded against for having violated the Illinois Act, this appeal should be dismissed as moot.

2. State regulation of interstate commerce will be sustained only if it is evenhanded regulation reflecting a legitimate local interest, with an effect on interstate commerce which is only incidental, and even then only if the burden on interstate commerce is not excessive. *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978); *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). The Illinois Act meets none of these tests.

The Illinois Act is not evenhanded because it protects incumbent Illinois target management at the expense of other important relevant interests. The effect of the Illinois Act on interstate commerce is not incidental and is adverse because the Act purports to apply on a global basis and serves to delay and threaten the completion of large transactions in interstate commerce. The Illinois Act does not regulate intra-state affairs in the

permissible manner of Blue Sky laws, *Hall* v. *Geiger-Jones Co.*, 242 U.S. 539 (1917), but is a direct attempt by Illinois to restrict transactions outside Illinois. Moreover, Illinois cannot justify the global impact of its takeover law as a regulation of the internal affairs of a corporation because a tender offer is not an internal corporate matter and the Illinois Act applies to non-Illinois corporations. The Illinois Act, which establishes a national system for regulation of tender offers, is invalid under the Commerce Clause.

3. Where a state statute prevents "the accomplishment and execution of the full purpose and objectives of Congress . . . the State law must yield to the federal." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 543 (1977). The Williams Act protects investors through a market approach whereby neutrality is preserved between the bidder and the target and the shareholder may exercise a free choice. In conflict with the market approach of the Williams Act, the Illinois Act adopts a regulatory approach requiring burdensome prenotification and potentially time-consuming administrative review with the ultimate possibility that the Secretary of State may refuse to permit the offer to be made. The Illinois Act is preempted by the Williams Act under the Supremacy Clause because it blatantly conflicts with the purposes of the federal legislation.

ARGUMENT

POINT I

This Appeal Presents No Case Or Controversy and Should Be Dismissed As Moot

MITE's tender offer for Chicago Rivet was made only after the issuance of a preliminary injunction by the District Court which restrained enforcement by Dixon of the Illinois Act. Dixon took no action to seek review of the preliminary injunction or other relief from the Court of Appeals until after the controversy between MITE and Chicago Rivet had been resolved by the agreement dated February 12, 1979 (Appendix A hereto). In

accordance with the agreement, MITE announced on March 2, 1979 that it would make no offer. MITE is precluded by the agreement from "at any time acquir[ing] or mak[ing] any offer to acquire any stock or assets of [Chicago] Rivet or mak[ing] any offer to merge, consolidate with or otherwise acquire [Chicago] Rivet." During the period between February 5, 1979, when under the protection of the District Court injunction MITE commenced its tender offer, and February 12, no stock of Chicago Rivet was purchased by MITE.

This Court's jurisdiction is dependent on the existence of a continuing case or controversy. "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe* v. *Wade*, 410 U.S. 113, 125 (1973). *See also Steffel* v. *Thompson*, 415 U.S. 452, 459 n.10 (1974); *SEC* v. *Medical Comm. for Human Rights*, 404 U.S. 403, 407 (1972). Chicago Rivet having taken no appeal from the District Court decision (and having no possible adversary interest in doing so by virtue of the agreement of February 12, 1979 and its aftermath), the only basis for continued litigation of this case within the scope of the jurisdiction conferred by Article III must lie in the possibility that MITE can be subjected to criminal or civil penalties for having acted in violation of the Illinois Act during a time when its enforcement against MITE's tender offer had been explicitly enjoined by the District Court. The appellees submit that the necessary effect to be accorded to injunctive relief granted by federal courts, as well as more general considerations of Due Process, preclude any such punitive proceedings. Accordingly, no case or controversy is presented by this appeal and it should be dismissed as moot.[6]

---

[6] In *Roe* v. *Wade* the Court found in the possibility that the plaintiff might become pregnant at a later time a "classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review'." 410 U.S. at 125. This gloss on the doctrine of mootness is inapplicable, for MITE is prohibited by its February 12, 1979 agreement with Chicago Rivet from "at any time" acquiring or offering to acquire any stock or assets of Chicago Rivet. Nor is the present case a class action, where the mootness doctrine has been applied with greater flexibility. *See United States Parole Comm'n.* v. *Geraghty*, 445 U.S. 388, 400 (1980).

A. Penalties may not be imposed for action taken under the protection of a federal court injunction.

A federal court may issue a preliminary injunction only as extraordinary relief, where there is no adequate remedy at law and the applicant for relief has demonstrated both the fact of irreparable injury if relief is not granted and a likelihood of success on the merits of the legal issue. *Brown* v. *Chote*, 411 U.S. 452, 456 (1973). The state of Illinois conceded the absence of any adequate remedy at law (JA-B-4) and the District Court made explicit findings and conclusions as to irreparable injury and the likelihood of MITE's success on the merits (JA-I-15). MITE's proposed offer had stated that MITE's ability to make the offer was dependent upon the issuance of a preliminary injunction against the Illinois Act. If Illinois is now allowed to seek criminal and civil penalties for MITE's conduct in reliance on the District Court order, the injunctive relief obtained will be rendered meaningless. A litigant in MITE's position, notwithstanding the injunction, would be forced to act completely at its peril, depending upon the eventual outcome of litigation over the legal issue. In such case, the party is no better off than if the injunction had never been issued.

The imposition of penalties for action taken in reliance on injunctive relief would run counter to decisions of this Court and other federal courts recognizing that the function of a preliminary injunction against a state statute is precisely to allow the party obtaining the injunction to act without fear of eventual prosecution. If the applicant for relief is situated "between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding," *Steffel* v. *Thompson*, 415 U.S. 452, 462 (1974), then an adequate showing of irreparable harm has been made and injunctive relief is appropriate. *See Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 500 (1925); *Terrace* v. *Thompson*, 263 U.S. 197, 216 (1923); *Salem Inn, Inc.* v. *Frank*, 501 F.2d 18, 21 (2d Cir. 1974), *aff'd in relevant part sub nom. Doran* v. *Salem*

Inn, Inc., 422 U.S. 922 (1975). If, however, action taken in reliance on the injunctive relief is not protected against subsequent criminal or civil penalties, the relief ostensibly obtained is a chimera, and the irreparable injury which formed the basis for relief remains as a threat.

Such a result would be particularly unjustified in this case. The District Court on February 2, 1979 purposely granted relief in the form of a preliminary injunction, rather than a temporary restraining order, so as to eliminate any possible issue as to its immediate appealability (JA-I-9), at the same time denying a requested stay of its order. (A-37a.) The State of Illinois, however, sought no interim relief by way of an application to the Court of Appeals[7] and did not file its notice of appeal until three weeks after entry of the District Court's final judgment granting MITE permanent injunctive relief. (JA-A-5.)

It would also be a result particularly unjustified in litigation concerning tender offers. In such a case, with time of the essence, the course of events stands in particularly striking contrast to the usual pace of constitutional litigation.[8] For this reason the consequences of delay become critical in evaluating the impact of legislation such as the Illinois Act, as we discuss below. As Judge Friendly trenchantly remarked in one of the earliest tender offer cases, "the application for a preliminary injunction is the time when relief can best be given." *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 947

---

[7] In prior tender offer litigation, Judge Crowley (the District Judge below) had granted injunctive relief against enforcement of the Illinois Act, on the ground that it was unconstitutional, the Court of Appeals for the Seventh Circuit had denied interim relief, and the Circuit Justice had refused to grant a stay. *Daylin, Inc.* v. *Uarco Inc.*, No. 78C4246, Order of Preliminary Injunction (N.D. Ill. Nov. 27, 1978), *stay pending appeal denied*, Nos. 78-2487 and 78-2488 (7th Cir. Nov. 28, 1978), *stay pending appeal denied sub. nom Dixon* v. *Daylin, Inc., No. A-251 (S. Ct. Dec. 4, 1978).*

[8] The proceedings in the District Court commenced on January 19, 1979; its preliminary injunction issued February 2, 1979; MITE and Chicago Rivet came to agreement on February 12, and concluded their relations with MITE's decision on March 2, 1979 to make no offer. The appeal to the Seventh Circuit, taken on March 2, 1979, was heard on November 9, 1979, and decision of the appeal was announced October 17, 1980. Probable jurisdiction was noted by this Court on May 4, 1981.

(2d Cir. 1969). In the situation posed by a tender offer, where the ability to act without artificial delay may be the deciding factor in the outcome of the offer, the right to rely on a preliminary injunction, so long as it is unstayed and unreversed, is of particular importance. The Court should not endorse a result which would render that reliance impossible.

B. Due Process considerations preclude the imposition of criminal or civil penalties for action taken in reliance on judicial pronouncements as to the validity of state statutes.

In a variety of contexts courts have recognized that Due Process considerations create a valid defense to criminal prosecution for acts taken in reasonable reliance upon judicial or administrative pronouncements. The present case, where MITE's action was taken in reliance upon an injunction obtained by MITE itself, clearly presents the strongest instance for recognition of such a defense.

In *Marks* v. *United States*, 430 U.S. 188 (1977), defendants were convicted in the lower court for transporting material which, while not obscene under the definition of obscenity which prevailed at the time of the act, was rendered obscene at the time of trial by an intervening decision of this Court. The Court held that Due Process mandated reversal of the conviction, stating that it "is fundamental to our concept of constitutional liberty" that a person "have fair warning of that conduct which will give rise to criminal penalties." 430 U.S. at 191. *See also Cox* v. *Louisiana*, 379 U.S. 559 (1965) (conviction for illegal picketing reversed because defendant had relied on permission from police officer); *Raley* v. *Ohio*, 360 U.S. 423 (1959) (conviction for refusal to testify before state commission reversed because witness had relied on opinion of commission chairman that he was privileged to remain silent).

In *United States* v. *Mancuso*, 139 F.2d 90 (3d Cir. 1943), defendant had obtained an *ex parte* order staying his induction

which was subsequently vacated. Nonetheless, the court held that he could not be held liable for ignoring induction notices which were issued while the order stood. Notwithstanding that the order was "erroneous," the court stated that liability cannot attach if

> the litigant does something . . . while under protection of a court order. . . . Until the order was vacated . . . it stood and the litigant can hardly be asked to determine at his peril the correctness of the court's decision. Appellate courts are provided for that purpose and the rule is well established that an initial decision stands until reversed or until vacated. . . .

139 F.2d at 92. *See also United States* v. *Barker*, 546 F.2d 940, 954-57 (D.C. Cir. 1976); *Kratz* v. *Kratz*, 477 F. Supp. 463, 480-83 (E.D. Pa. 1979); *United States* v. *Ehrlichman*, 376 F. Supp. 29, 35 (D. D.C. 1974), *aff'd*, 546 F.2d 910 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977).

In this case injunctive relief was sought and obtained for the specific purpose of enabling MITE to commence a tender offer without risk of prosecution under the Illinois Act. It would not be consonant with considerations of Due Process if action taken in reliance thereon were subject to subsequent criminal prosecution or civil penalties.[9] Yet without that possibility the appeal presents no current case or controversy and should be dismissed as moot.

POINT II

The Illinois Act Is Unconstitutional Under The Commerce Clause

State regulation that unduly burdens interstate commerce has been invalidated since Chief Justice Marshall's decision in

---

[9] It should also be noted that the Illinois criminal code itself provides that there can be no criminal liability for actions taken "in reliance upon an order or opinion of . . . a United States appellate court later overruled or reversed. . . ." Illinois Rev. Stat. ch. 38, § 4-8(b) (1979). This statute has been

footnote continued

Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824), affirming the supremacy of the national power under the Commerce Clause where it conflicts with state law.[10] Even where state regulation which affects interstate commerce is not automatically excluded by a federal statute, it will be sustained, under the test most recently formulated by this Court, only if it is an evenhanded regulation reflecting a legitimate local interest, with an effect on interstate commerce which is only incidental and even then only if the burden on interstate commerce is not clearly excessive.[11]

The Illinois Act meets none of these tests. As we shall show, it is not evenhanded, but, on the contrary, protective of incumbent Illinois corporate management against other relevant interests. The Act is not local legislation with merely incidental effects on interstate commerce; on the contrary, its global effect is apparently an indispensable and intended consequence. Its adverse effect on interstate commerce is the assertion of the power to thwart nationwide transactions, in which non-Illinois contacts may predominate. The Illinois Act stands, in short, as a national regulation of an aspect of interstate commerce in securities which is also governed, under different requirements, by federal law. Indeed, the Illinois Act appears to have been enacted in part precisely in order to impose requirements specifically rejected by Congress.

---

liberally read. *See People* v. *Dean*, 73 Ill. App.3d 501, 392 N.E.2d 57 (1979). The Illinois court's emphasis on the "spirit of the rule of the statutory defense of reliance," *id.* at 503, 392 N.E.2d at 59, suggests that the statute would be held to bar prosecution in the instant case where the Seventh Circuit has affirmed the District Court's grant of injunctive relief, even if this Court were to reverse the judgment of the Court of Appeals.

[10] The Court struck down New York's attempt to enforce a monopoly on steam navigation on the waters of New York granted by the state against a holder of a federal license to engage in coastwise shipping.

[11] *See Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978) (quoting *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Appellant suggests that the decision of the Court of Appeals affirming the unconstitutionality of the Illinois Act as violative of the Commerce Clause overlooks a justification of the law as a legitimate regulation of internal corporate affairs. Appellant's Br. at 25-27. As we shall show, the Act can be sustained neither by this internal affairs argument nor by appeal to the recognition of state securities regulations which are not inconsistent with federal law contained in section 28(a) of the Exchange Act, 15 U.S.C. § 78bb(a).

A. The Illinois Act is not evenhanded.

The Illinois Act can be described as "evenhanded" only in the sense that it prohibits a shareholder not an Illinois resident from accepting an offer in the same way in which it prohibits acceptance of the offer by an Illinois shareholder. Its effect as a protection for incumbent Illinois corporate management, in contrast to other important and relevant interests (economic efficiency, freedom of shareholder choice, the efficiency of the national securities markets and the interests of other states and their residents), is manifest.[12] The Illinois Act purports to protect the interests of Illinois securityholders, but by its terms it applies even if there are no shareholders in Illinois.[13]

The Illinois Act imposes a precommencement period of notification, which has been widely recognized as important to the defense against a tender offer. *See Kennecott Corp.* v. *Smith*, 637 F.2d 181, 188-89 (3d Cir. 1980); *Great Western United*

---

[12] Neither the Court of Appeals here, 633 F.2d at 500-01, nor the Fifth Circuit in *Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256, 1279 (5th Cir. 1978), *rev'd on venue grounds sub nom. Leroy* v. *Great Western United Corp.*, 443 U.S. 173 (1979), thought it appropriate to probe state legislative motivation. We, likewise, see no need to do so.

[13] The Illinois Act applies to offers for stock of a "target company," defined in § 2-10 of the Illinois Act (A-48a) in several alternative ways. The definition is satisfied whether or not there are any Illinois shareholders, if the company is organized under Illinois law and has its principal executive office in Illinois or if either one of those tests is met and 10% of its capital and surplus are "represented" in Illinois.

Corp. v. *Kidwell*, 577 F.2d at 1279. It allows the "outside" directors of the target to require the Secretary of State to hold a hearing on the merits of the offer under procedures which impose no time limit on the conduct of the hearing itself.[14] It completely exempts from coverage a corporation's acquisition of its own stock. Illinois Act § 2.09(4). Thus, Chicago Rivet was able to mount a competing partial tender offer for its own stock, without compliance with the Illinois Act, to frustrate MITE's offer. In respect of that offer, the shareholders of Chicago Rivet were left to depend only on the disclosures and other procedures required by federal law, which the appellant would have this Court believe Illinois viewed as inadequate to protect investors. This statutory distinction is at variance with Illinois' asserted legislative purpose and bears heavily on the claim that the Illinois Act shares with the Williams Act the objective of "investor protection."

B. The effect of the Illinois Act on interstate commerce is not "incidental" but, on the contrary, significant and purposeful.

A characteristic of the Illinois Act and others like it that has been much noted[15] is that they are global in scope. A tender offer subject to the Illinois Act may not commence anywhere in the world unless it may commence in Illinois. This is in sharp contrast with the Illinois Blue Sky law, which regulates only offers to Illinois residents.[16]

This distinction between the coverage of the two statutes is obviously purposeful, and although the State of Illinois does not

---

[14] Section 7 of the Illinois Act (A-53a) provides that the hearing must begin within 15 business days of the request, and that a decision must be reached within 15 business days of the conclusion of the hearing. (A-53a-54a.)

[15] *See, e.g.*, E. Aranow, H. Einhorn & G. Berlstein, *Developments in Tender Offers for Corporate Control* 231 (1977); Note, *The Constitutionality of State Takeover Statutes: A Response to Great Western*, 53 N.Y.U. L. Rev. 872, 929 (1978); Langevoort, *State Tender-Offer Legislation: Interests, Effects and Political Competency*, 62 Cornell L. Q. 213, 219-20 (1977).

[16] *See* Ill. Rev. Stat. ch. 121½, § 137.5 (1975).

discuss the point, it is candidly stated in the *amicus* brief of the North American Securities Administrators Association, Inc., as it is in the literature,[17] that global regulation is indispensable to the effective regulation of tender offers. The *amicus* brief asserts that "[w]ithout the extraterritorial effect of the state action to stop the entire takeover bid, the takeover could be completed and control of the corporation shifted to the detriment of Illinois and its shareholders. An injunction which was limited in its scope to restraining the takeover bid within the borders of Illinois would be ineffective." (NASAA *amicus* Br. at 26-27.) This proposition that a cash tender offer cannot effectively be regulated by state legislation which has a "merely incidental" effect on interstate commerce deprives the Illinois Act of possible justification under the accepted tests.[18] On the contrary, it is to Congress, not state legislatures, that the Commerce Clause assigns the power to regulate, where only nationwide regulation can be effective. A state cannot claim that it has an interest in protecting non-residents and in regulating transactions that take place outside the state. *Cf. Baldwin* v. *Seelig, Inc.*, 294 U.S. 511, 521 (1935) ("New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there.").

C. The effect on interstate commerce is adverse.

The parties stipulated and the District Court found that MITE's proposed tender offer represented a transaction in interstate commerce of approximately $23 million. (JA-B-3; A-34a.) The threat posed by the Illinois Act to completion of an offer, or to the substantial delay of it, is palpable. The courts below properly accepted delay as an important and possibly

---

[17] *See, e.g.*, E. Aranow & H. Einhorn, *Tender Offers for Corporate Control* 157 (1973); Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 Yale L. J. 510, 515 (1979).

[18] The Court of Appeals left open the possibility of a valid state takeover statute, 633 F.2d at 503, and it may be that a tender offer law, which, like Blue Sky laws, applied only locally, would be valid, so far as its jurisdictional sweep was concerned.

decisive factor in the outcome of a tender offer. And beyond the simple fact of delay is the assertion by the State in the hearings provision of the right to prohibit the offer everywhere if the Secretary of State should find that the offer "fails to provide full and fair disclosure" or "is inequitable" or "would work or tend to work a fraud or deceit."[19] Illinois Act § 7(E)(A-54a).

Still further adverse consequences to interstate commerce arise from the possibility of a conflict of jurisdictions, which laws like the Illinois Act threaten, given the ingenuity and energy of incumbent management acting in its own defense. That this is no mere theoretical argument is vividly illustrated by this case. Chicago Rivet sought to portray itself as a corporation with its center of gravity in Pennsylvania and brought suit in Pennsylvania state court and applied for relief to the Pennsylvania Securities Commission. Chicago Rivet was permitted to open this second front because the Pennsylvania Act is not confined in application to corporations organized under Pennsylvania law.[20] In this respect it is similar to the Illinois Act which also applies much more broadly than merely to Illinois corporations.[21] Indeed, the Illinois Act applies even if the target corporation is neither incorporated nor headquartered in Illinois, provided only that more than 10% of its outstanding securities are held by Illinois residents.

---

[19] Appellant argues that the ability to declare an offer "inequitable" does not empower the Secretary to pass on the substantive fairness of the offer. The appellant's assertion is clearly inconsistent with the plain meaning of the term "inequitable." Moreover, in the Court of Appeals appellant took an inconsistent position and defended its power to ascertain the fairness of an offer stating "allowing for review by a neutral state administrator while the securityholders have time to consider the offer" will not result in unnecessary delay. 633 F.2d at 493 (quoting Appellant's Br. at 17). The Court of Appeals rejected this argument because "Illinois' substitution of the judgment of its Secretary of State for an investor's own assessment of the equitability of a tender offer is patently inconsistent with the Williams Act." *Id.* at 494.

[20] In *Crane Co.* v. *Lam*, 509 F. Supp. 782, 790 (E.D. Pa. 1981), the court, in striking down the Pennsylvania Act under the Supremacy and Commerce Clauses, noted the "burden on interstate commerce" from "the serious danger of conflict with other states' tender offer statutes."

[21] This, of course, has devastating consequences for the belated and labored argument that the Illinois Act is properly viewed merely as a regulation of corporate "internal affairs." *See* pp. 20-23 *infra*.

These overlapping assertions of jurisdiction are important from several perspectives. They threaten a kind of Balkanization which, from the earliest days, the Commerce Clause has served to prevent.[22] Moreover, to the extent that a state or its residents may have a legitimate interest in a tender offer, even if the state is not the place of incorporation or the number of resident shareholders is less than a majority, assertions of jurisdiction with global application go too far. Where a transaction has substantial contacts with two or more states, as will be true of any tender for stock of a widely held public corporation,[23] where the subject matter, national securities transactions, has been regulated by Congress just short of a half century, and where the particular form of transaction, a cash tender offer, is the specific subject of congressional action, the case for invalidation of a state statute such as the Illinois Act, which asserts a right of worldwide regulation, is overwhelming.

D. The constitutionality of Blue Sky laws and the accommodation of federal securities regulation with Blue Sky laws does not sustain the Illinois Act.

One of the two grounds on which the defense of state takeover statutes such as the Illinois Act is usually put is the contention that they are simply a variant of state securities regulation, long ago held to be constitutional, with which national regulation of securities is fully consistent as evidenced by the explicit protection of state securities regulation accorded by section 28(a) of the Exchange Act. This argument overlooks the fact that the constitutional decisions and the national/state legislative accommodation reflected in section 28(a), which it should be noted preserves state jurisdiction only "insofar as it does not conflict" with federal legislation, relate to the state Blue Sky laws which

---

[22] *See, e.g., Hughes* v. *Oklahoma*, 441 U.S. 322, 325-26 (1979); *H.P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525, 530-34 (1949); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) at 86-87.

[23] As a practical matter, a contested tender offer can be successfully contemplated only if stock of the target corporation in question is widely held.

constitute much more modest assertions of state power, with a truly "merely incidental" effect on interstate commerce. *See* Langevoort, *supra* note 15, at 214-16. The contrast in this respect between the Illinois Act and the Illinois Blue Sky law has already been noted. *See* p. 15 n.16 *supra*.

The principal case decided by this Court concerning the constitutionality of state Blue Sky laws under the Commerce Clause is *Hall* v. *Geiger-Jones Co.*, 242 U.S. 539 (1917).[24] The decision emphasizes the point which so sharply distinguishes the Illinois Blue Sky law from the Illinois Act, the carefully limited local impact of the Blue Sky laws.

> The provisions of the law, it will be observed, apply to dispositions of securities *within* the State and while information of those issued in other States and foreign countries is required to be filed (§§ 6373-9), they are only affected by the requirement of a license of one who deals in them *within* the State. Upon their transportation into the State there is no impediment—no regulation of them or interference with them after they get there. There is the exaction only that he who disposes of them there shall be licensed to do so and this only that they may not appear in false character and impose an appearance of a value which they may not possess—and this certainly is only an indirect burden upon them as objects of interstate commerce, if they may be regarded as such. . . . Such regulations affect interstate commerce in them only incidentally.

242 U.S. at 557-58 (citations omitted; emphasis in original). The Ohio law at issue in *Hall* did not prohibit or restrict transactions outside Ohio, and did not even prohibit the initial sale of securities to an Ohio dealer or the importation of the securities into the state, but was aimed at the offer for public sale of securities in Ohio by an unlicensed dealer. Thus, the Court was

---

[24] Two companion cases relied on *Hall* on the Commerce Clause point. *See Caldwell* v. *Sioux Falls Stock Yards Co.*, 242 U.S. 559, 567-68 (1917) (South Dakota statute); *Merrick* v. *N.W. Halsey & Co.*, 242 U.S. 568, 584 (1917) (Michigan statute).

readily able to conclude that the interstate character of securities that come into the State "is only incidentally affected by the statute." *Id.* at 559. In all these respects, the contrast with the sweep of the Illinois Act could not be more pointed.

It is these limited Blue Sky statutes, in existence for many years, that section 28(a) explicitly acknowledges. *See* I L. Loss, *Securities Regulation* 30-31 (2d ed. 1961). The jurisdiction preserved in section 28(a) is that "of State security commissions to regulate transactions within their own borders." H.R. Rep. No. 85, 73d Cong., 1st Sess. 10 (1933).[25] Section 28(a), of course, long antedates the far wider assertion of state jurisdiction reflected in state laws such as the Illinois Act, which can claim no legitimacy from section 28(a).[26]

E. The Illinois Act cannot be sustained as merely a regulation of the internal affairs of a corporation.

The second principal justification now claimed for statutes like the Illinois Act against a Commerce Clause challenge is that they are merely regulations of the internal affairs of a corporation. *See* Appellant's Br. at 25-27; NASAA *amicus* Br. at 19-26; New York *amicus* Br. at 14-17; Ohio *amicus* Br. at 12-16. The "internal affairs" argument has at least the merit of recognizing that statutes like the Illinois Act cannot plausibly be said to have

---

[25] The legislative history of § 28(a) indicates, as does the text, that it was merely intended to express the principles of the Supremacy Clause. *See Stock Exchange Practices: Hearings on S. Res. 84 (72d Cong.), S. Res. 56 and S. Res. 97 (73d Cong.) Before the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. 6577 (1934) (remarks of Thomas Corcoran). *Accord, Great Western United Corp.* v. *Kidwell*, 577 F.2d at 1276.

[26] Nor does the failure of the Williams Act to deal explicitly with state tender offer laws constitute express or implied congressional approval of them. The Williams Act was the result of legislative efforts between 1966 and 1968, and at its enactment on July 29, 1968, only Virginia had adopted a tender offer law. Virginia's statute, Va. Code 13.1-528 (Va. Acts 1968, ch. 119) became effective on March 5, 1968. There is no evidence in the legislative history of the Williams Act that Congress was aware of Virginia's takeover act. For a recent survey of state takeover laws see Shapiro, *State Takeover Laws*, in Practicing Law Institute, Twelfth Annual Institute on Securities Regulation 401-442 (1980).

the requisite "merely incidental" effect on interstate commerce. It fails, however, for two substantial reasons: the Illinois Act is not confined to corporations whose "internal affairs" are subject to Illinois regulation, and a tender offer, in any event, is not a matter of internal corporate affairs.

The impact on interstate commerce of state regulation of internal corporate governance is, of course, extensive. The acceptance of it, so far as Commerce Clause analysis is concerned, is in large part pragmatic.[27] There is no general federal substantive law of corporations, and predictability, consistency and fairness require that questions of corporate governance generally be regulated by one law, not many, and that that one law be known.[28] Thus, as a general proposition, matters of the "internal affairs" of a corporation are referred to the law of the state under which the corporation was organized.

The Illinois Act is neither in stated purpose nor in operation a statute which is intended to govern the internal affairs of corporations subject to Illinois regulation. On the contrary, the very different stated purpose of the Illinois Act is "to protect the interests of Illinois securityholders of companies having a close connection with this State without unduly impeding takeover offers. . . ." (A-45a.) Nor is regulation of internal corporate affairs the effect of the Illinois Act. It does not, for example, even apply to all Illinois-chartered corporations, but only to those that have either their principal executive office in Illinois or at least 10% of their stated capital and paid-in surplus represented in Illinois. (A-48a.) Moreover, any corporation with

---

[27] *See* Reese & Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 Colum. L. Rev. 1118, 1124-26 (1958).

[28] *See* Restatement (Second) of Conflict of Laws § 302, Comment e (1971), which, in the context of questions relating to corporate governance, states that "application of the local law of the state of incorporation will usually be supported by those choice-of-law factors favoring the needs of the interstate and international systems, certainty, predictability and uniformity of result, protection of the justified expectations of the parties and ease in the application of law. . . ." *See generally* Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Case Western Reserve L. Rev. 722, 742-45 (1970).

10% or more of its stock held by Illinois shareholders of record is subject to the Act, as is a corporation with executive offices and 10% of capital and surplus in Illinois, even if incorporated elsewhere. It is neither sufficient nor legitimate analysis to view the Illinois Act as a regulation of corporate internal affairs merely because there is some overlap between the companies subject to the Illinois Act and the category of companies whose corporate affairs are by constitutional convention subject to regulation by Illinois.[29]

The second defect in the "internal affairs" argument is that a tender offer is not an internal corporate transaction. Literally, of course, it is an offer to purchase the shares held by an existing shareholder, and if accepted, results in a purchase. Offers to purchase and purchases of corporate stock are an everyday occurrence and are not classified as an aspect of internal corporate affairs. After becoming a stockholder, the buyer may participate in matters of internal corporate affairs, such as stockholder meetings, and stockholders, if numerous enough and united in purpose, can effect major changes in corporate affairs. That such events may follow from the purchase of stock does not, however, transform the original purchase into a transaction which itself was a matter of internal corporate affairs.[30] A tender offer cannot be treated as an internal corporate matter without a misuse of terminology. Just as constitutional infirmity "is not to be avoided by 'simply invoking the convenient apologetics of the police power . . . '," *Southern Pacific Co.* v. *Arizona*, 325

---

[29] The Court is not bound by "[t]he name, description or characterization given" the Illinois Act by the Illinois legislature but may "determine for itself the practical impact of the law." *Hughes* v. *Oklahoma*, 441 U.S. at 336.

[30] [A] tender offer involves the sale of securities from one shareholder to another, not a change in the corporation itself. The voting rights of shares and the legal relationship between a corporation and its shareholders does not change because of a tender offer.

Great Western United Corp. v. *Kidwell*, 577 F.2d at 1280 n.53. *See also* Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 Fordham L. Rev. 1, 16-17 (1976); Note, *Commerce Clause Limitations upon State Regulation of Tender Offers*, 47 S. Cal. L. Rev. 1133, 1153-55 (1974).

U.S. 761, 780 (1945), so it is not to be avoided by mechanical recitation of the talismanic phrase "internal corporate affairs."

F. The Illinois Act constitutes a scheme for national regulation of tender offers in competition with that enacted by Congress.

The specific conflicts between the Illinois Act and the Williams Act require the conclusion, set forth in Point III, that the Illinois Act is invalid on Supremacy Clause preemption grounds. There is therefore no occasion to elaborate the point, particularly relevant to Commerce Clause analysis,[31] that the Illinois Act, because of its extraordinary global reach, represents a truly national (indeed, international[32]) system for regulation of those tender offers to which it applies. The Secretary of State, in whom administration of the Illinois Act is reposed, "may accept," but thus evidently need not, in lieu of the registration statement required by the Illinois Act, a "form or other filing required by a federal . . . agency" but only if it is one "which the Secretary has determined . . . to encompass disclosure requirements substantially equivalent" to those required by the Illinois Act. (A-52a.) Even though a particular tender offer has met Williams Act disclosure requirements and would be able to be made so far as federal law is concerned, the Secretary may prohibit its being made if he "finds that the take-over offer fails to provide full and fair disclosure to the offerees of all material information . . . or that the take-over offer is inequitable . . . ." (A-54a.) Thus MITE, a Delaware corporation, with its executive office in New Haven, Connecticut and manufacturing facilities in Connecticut and Indiana (JA-C-3), may be prohibited by the Illinois Secretary of State from making an offer to a person residing anywhere

---

[31] *See, e.g., Baldwin* v. *Seelig, Inc.*, 294 U.S. at 511.

[32] It is clear that the Illinois Act prohibits an offer by MITE to a Chicago Rivet stockholder residing in Canada (or Mexico or wherever) unless the Illinois Act is complied with. The Illinois Act requires that an offer be made on the same terms to Illinois shareholders as other stockholders. An offeror precluded from purchasing shares in Illinois thus could not make an offer to Canadian shareholders without violating the Illinois Act.

in the world. This is truly an empire within an empire, a jurisdictional sweep hardly, if ever, before asserted by a State as justified under the Commerce Clause.[33] A decision sustaining the Illinois Act has the gravest implications for the powers of the national government in respect to matters which, if contentions made in support of the appellant are accurate, can only be effectively regulated on a national basis, as the Congress has plainly attempted to do in the Williams Act.

POINT III

The Illinois Act Is Preempted By The Williams Act

The Illinois Act is preempted by the Supremacy Clause because it conflicts with the purposes and effects intended by Congress in the Williams Act. Congress enacted the Williams Act to protect shareholders by mandating various timing and disclosure provisions and by taking care not to discourage the use of the tender offer device for corporate acquisitions. To achieve a neutral balance in the Williams Act which favored neither an offeror nor target management, Congress adopted a "market approach" which requires the disclosure of material information but leaves to the shareholders the decision whether or not to tender their stock. The Williams Act protects the shareholder by providing him with material information and then letting him determine whether the offer is in his own best interests.

In contrast, the Illinois Act utilizes a "regulatory approach," whereby burdensome prenotification and administrative requirements serve to delay the offer and substitute the judgment of an Illinois administrator for that of the public shareholders, even if,

---

[33] In the usual case in which state legislation has been invalidated in this Court because it is in violation of the Commerce Clause, the legislation under attack has been at least ostensibly directed at regulation of purely local matters. *See, e.g., Kassel* v. *Consolidated Freightways Corp.*, ___ U.S. ___, 49 U.S.L.W. 4328 (March 24, 1981) (truck length); *Southern Pacific Co.* v. *Arizona*, 325 U.S. at 761 (train length); *South Carolina State Highway Dep't* v. *Barnwell Brothers, Inc.*, 303 U.S. 177 (1938) (truck mud flaps). Here, however, the Illinois Act overtly asserts the right to regulate transactions outside Illinois conducted between non-residents of the state.

as in this case, most of them do not reside in Illinois.[34] The primary beneficiary of the Illinois Act is incumbent management of the target company which obtains an opportunity to delay and defeat a proposed tender offer. The Illinois Act impedes realization of the purpose of the Williams Act and is therefore invalid under the Supremacy Clause.

A. The Williams Act protects investors through a market approach.

The Williams Act was enacted to close the gap in the disclosure requirements of the federal securities laws by bringing cash tender offers, which were previously unregulated, within the ambit of federal securities legislation. *See Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 22 (1977). The dominant theme of the Williams Act, as this Court has noted, is the protection of investors. *Id.* at 28. This protection is achieved under the Williams Act through a "market approach," whereby "the offeror and the incumbent managers of a target company . . . present fully their arguments and then . . . *let the investor decide for himself.*" *Great Western United Corp.* v. *Kidwell*, 577 F.2d at 1276 (emphasis added). The Williams Act operates "to ensure that full information is conveyed to the shareholders of a target company as soon as possible, so that they may exercise a knowledgeable and an unfettered choice." *Kennecott Corp.* v. *Smith*, 637 F.2d at 187-88. As the Seventh Circuit stated in this case, "Congress contemplated only that investors be protected from acting in ignorance, not from their own well informed choice." 633 F.2d at 494.

The Williams Act imposes three basic requirements in order to effectuate its purposes:

(i) An offeror must file a Schedule 14D-1 with the SEC and publish certain information required by the SEC upon commencing the offer. 15 U.S.C. § 78n(d)(1).

---

[34] As noted above, because Chicago Rivet is an Illinois corporation with its executive office in Illinois (A-28a) the Illinois Act would apply even if *no* holders of its stock resided in Illinois. (A-48a.) In actual fact, approximately 27% of Chicago Rivet's shareholders were Illinois residents. (A-33a.)

(ii) A tender offer for any and all shares, as in the case of MITE's offer, must remain open for seven days (ten days in the case of an offer for less than all shares) during which a shareholder may withdraw any shares he has tendered.[35] 15 U.S.C. §§ 78n(d)(5), 78n(d)(6).

(iii) All shares which the offeror purchases must be purchased upon the same terms and for the same price.[36] 15 U.S.C. § 78n(d)(7).

In enacting the Williams Act, Congress attempted "to preserve a balance between incumbent management and the offeror so that neither group has an undue advantage." *Kennecott Corp.* v. *Smith*, 637 F.2d at 188. The balance struck requires disclosure by the offeror to inform shareholders, but within a procedural framework that does not discourage tender offers, so that the investors do not lose the benefit of such offers.[37] This

---

[35] The SEC, subsequent to the commencement of MITE's tender offer, adopted rules mandating that an offer remain open for 20 business days from commencement, 17 C.F.R. § 240.14e-1 (1980), and that withdrawal rights must extend for 15 business days from commencement, 17 C.F.R. § 240.14d-7 (1980). Because these rules do not apply to tender offers made prior to their effective date, they are not applicable to this case. 44 Fed. Reg. 70326 (1979).

[36] The SEC has recently promulgated additional rules pursuant to the Williams Act, such as the requirement that an offer must be commenced or abandoned no later than five business days after public announcement of the material terms of the offer. 17 C.F.R. § 240.14d-2(b)(1980).

[37] The legislative history of the Williams Act makes it clear that the intention of Congress was to preserve a policy of legislative neutrality in tender offers. The following dialogue is illustrative:

> MR. JAVITS. One other question I should like to ask the Senator: There is no intendment in the measure, or in the fact that the measure is offered, to in any way condemn the practice of making tenders, is there? Sometimes stockholders do very well because of tenders, especially competitive tenders.
>
> MR. WILLIAMS of New Jersey. There is no intention in any way to prohibit tender offers. As a matter of fact, I think it might encourage them. Through this legislation, people will have more information, and will be able to intelligently decide whether to accept a tender offer and sell their shares to a group which may wish to obtain a controlling interest.

113 Cong. Rec. 24665 (1967).

Senator Javits also later remarked in the same discussion:

> I gather that the point of the Senator from New Jersey [Senator Williams] and the Senator from California [Senator Kuchel] is that this is at least a beginning in keeping up with getting adequate representation

footnote continued.

Court, in *Rondeau* v. *Mosinee Paper Corporation*, 422 U.S. 49, 58-59 (1975), noted this intention of Congress in enacting the Williams Act:

> The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party. By requiring disclosure of information to the target corporation as well as to the Securities and Exchange Commission, Congress intended to do no more than give incumbent management an opportunity to express and explain its position. The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts. Indeed, the Act's draftsmen commented upon the "extreme care" which was taken "to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid." S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968). See also *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 947 (CA2 1969).

The Williams Act effectuates the congressional purpose of aiding investors by requiring the dissemination of material information to the market and assuring investors that they, and not target management or an administrator, determine the ultimate success of an offer.

B. The Illinois Act's regulatory approach conflicts with the Williams Act.

In conflict with the market approach of the Williams Act, the Illinois Act adopts a regulatory approach requiring burdensome

and adequate information on the part of the stockholder, who could conceivably be imposed upon, without denying him the opportunities which result from the competitive bidding for a block of stock of a given company.

113 Cong. Rec. 24665-66 (1967).

prenotification and potentially time-consuming administrative review with the ultimate possibility that the Illinois Secretary of State may refuse to permit the offer to be made. The Illinois Act obstructs tender offers in three principal ways:

(i) The Illinois Act requires a twenty-business-day prenotification. Illinois Act § 4. Section 14(d) of the Williams Act contains no prenotification requirement. Indeed, Congress rejected prenotification proposals both during its consideration of the Williams Act and after its enactment.[38]

(ii) If a hearing is called, the Illinois Act prevents a tender offer from being made until the hearing has been completed. A

---

[38] In 1965, Congress rejected a proposed twenty-day prenotification requirement. *See* 111 Cong. Rec. 28257-28259 (1965). In 1967, Congress rejected a five-day prenotification requirement. Senate Comm. on Banking and Currency, Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids, S. Rep. No. 550, 90th Cong., 1st Sess. 4 (1967); *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Sec. of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 72-75, 87-89, 98, 105, 139-40, 151, 163, 245 (1967); *Takeover Bids: Hearings on H.R. 14475 and S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 44-46, 50-54 (1968). In 1970, Congress rejected yet another prenotification proposal. *See Investor Protection in Corporate Takeovers: Hearings on H.R. 4285, S. 3431 and S. 336 Before the House Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 6-7 (1970).

This prenotification requirement also directly conflicts with the SEC's subsequently adopted Rule 14d-2(b), 17 C.F.R. § 240.14d-2(b) (1980), which requires that an offer commence within five business days of the announcement of the material terms of the offer. *See, e.g., Kennecott Corp.* v. *Smith*, 637 F.2d at 182, *after remand*, 507 F. Supp. 1206 (D. N.J.), *appeal pending*, No. 81-1679 (3d Cir. filed April 1, 1981); *Canadian Pacific Enterprises (U.S.) Inc.* v. *Krouse*, 506 F. Supp. 1192 (S.D. Ohio Jan. 13, 1981), *appeal pending*, No. 81-3083 (6th Cir. 1981); *Joseph E. Seagram & Sons, Inc.* v. *Marley*, No. 81-869-W (W.D. Okla. July 17, 1981); *Crane Co.* v. *Lam*, 509 F. Supp. at 1182; *Natomas Co.* v. *Bryan*, 512 F. Supp. 191 (1981); *Eure* v. *Grand Metropolitan Ltd.*, [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,694 (N.C. Super. Ct. April 18, 1980); *Hi-Shear Ind., Inc.* v. *Campbell*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,804 (D.S.C. Dec. 4, 1980); *Hi-Shear Ind., Inc.* v. *Neiditz*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,805 (D. Conn. Dec. 16, 1980). Rule 14d-2(b) illustrates a federal policy in favor of the prompt dissemination of tender offer materials. The Seventh Circuit did not base its finding of preemption on the new rules because these rules do not apply to tender offers made prior to their effective date. 44 Fed. Reg. 70326 (1979).

majority of the "outside" directors of a target company can demand a hearing. The directors need not act until fifteen business days after a registration statement is filed. Illinois Act § 7(A). The Secretary of State is required to call a hearing within ten business days, or approximately two weeks after such a demand, but the Secretary has discretion to extend the date for starting the hearing (Illinois Act § 7(C)), and there is no time limit whatever as to the duration of the hearing. The Secretary is required to rule within fifteen business days, or approximately three weeks after the conclusion of the hearing, but this time, too, may be extended by the Secretary. Illinois Act § 7(D). In contrast, the Williams Act does not contemplate or require any hearings. The hearing provisions of the Illinois Act directly contravene the Williams Act by forestalling shareholders' exercise of judgment in the marketplace.

(iii) The Illinois Act authorizes the Secretary to deny the registration of the offer or condition its registration upon certain changes or modifications if he finds that the takeover offer fails to provide full and fair disclosure or that the takeover offer is inequitable or would work or tend to work a fraud or deceit on offerees. Illinois Act § 7(E). By allowing the Secretary to pass upon the substantive fairness of a tender offer and to prohibit it from going forward, if, in his sole opinion, the offer is "inequitable," the Illinois Act directly conflicts with the market approach of the Williams Act.[39]

C. The Williams Act preempts the Illinois Act.

The Supremacy Clause will serve to invalidate state statutes which conflict with the express provisions or the clear purpose of

---

[39] The Illinois Act also requires more extensive disclosure by an offeror than does the Williams Act. *Compare* Illinois Act § 4 and § 9(D) (1976) *with* 15 U.S.C. § 78n(d) (1976) *and* 17 C.F.R. § 240.14d-8 (1980). It has been noted that these extensive further disclosures required of a tender offeror do not assist the shareholder in making the key economic evaluation, which is to assess the price offered in relation to the value of the target company under current management. This is information much more likely to be in the possession of target management than the offeror. Yet the Illinois Act exempts incumbent management from its provisions even when, as here, the target makes a counter-offer for its own stock. Illinois Act § 2.09(4). *See* Langevoort, *supra* note 15, at 238-39.

federal law. Where a state statute prevents "the accomplishment and execution of the full purposes and objectives of Congress . . . the state law must yield to the federal." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 543 (1977). *See also Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

Appellant argues that the Illinois Act does not conflict with the Williams Act because both statutes protect investors. To support its argument, appellant asserts that "[t]he overriding theme of the Williams Act is that of protecting the investor as opposed to undertaking a definitive balancing of the position of the offeror versus that of target company management." Appellant's Br. at 16. This argument misconstrues the purpose of the Williams Act and the congressional scheme for implementing it.

Congress enacted the Williams Act to protect shareholders by requiring the disclosure of material information and by preserving a balance between the offeror and incumbent management. It cannot be said that the purpose was solely to protect shareholders without examining the means by which the purpose was to be accomplished. As the Third Circuit observed in *Kennecott Corp.* v. *Smith*, 637 F.2d at 188: "The Act is also designed to preserve a balance between incumbent management and challenging groups, so that neither has an undue advantage." *See also Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. at 58-59; *Great Western United Corp.* v. *Kidwell*, 577 F.2d at 1277; S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967); 113 Cong. Rec. 854 (1967) (statement of Senator Williams). By preserving this balance, the Williams Act protects shareholders from the excesses both of incumbent management and the offeror. As the Seventh Circuit noted in this case:

> [I]nhibitions on tipping the regulatory balance, particularly on tilting toward incumbent management, are important because maintenance of an equitable balance between the contending sides is perceived as a principal means of investor protection. For if the weapons in management's arsenal are drastically augmented, the vigor of the tender offer device will at

> some point be impaired, denying protection to stockholders in an obvious dimension: the right to tender their shares at a premium. Thus, in its concern for investors, Congress was necessarily committed to maintaining, where appropriate, the basic capability of offerors to make successful tender offers (as well as, of course, maintaining the free flow of information to stockholders both from offerors and from management).

633 F.2d at 496.

It is clear from the legislative history of the Williams Act as interpreted by three different Courts of Appeals that a purpose of the Williams Act was to preserve neutrality. It is equally clear that the Illinois Act attempts to alter that neutrality by giving target management a highly potent weapon—delay. In fact, appellant does not even argue that the Illinois Act does not serve to benefit target management. Rather, appellant argues that because the Illinois Act benefits target shareholders it should not be struck down "merely because the balance between the offeror and incumbent management may be affected or a particular offeror might not prevail." Appellant's Br. at 17.

Despite the Illinois Act's stated purpose of neutrality and shareholder protection, its actual provisions have the effect of inhibiting tender offers for the benefit of incumbent management. In *Jones* v. *Rath Packing Co.*, 430 U.S. at 526, the Court stated that the inquiry under the Supremacy Clause "requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." In *Jones*, a federal regulation permitted reasonable variations in the stated weight of certain packaged foods. A California statute required strict accuracy for net-weight labeling. The purpose of both federal and state laws was to protect consumers. However, the Court struck down the California law, even though state and federal law could both be complied with, because the state law interfered with a purpose of the federal law in facilitating value comparisons among similar products. *Id.* at 519. Here, the Illinois Act must yield to the Williams Act,

even though the stated purpose of both is to protect investors, because the state law interferes with the mechanism provided by Congress of protecting investors through the "market approach."

The Fifth Circuit Court of Appeals accepted this analysis in holding the Idaho Take-Over Act unconstitutional:

> Idaho chose to protect investors differently from the way Congress protected investors. . . . Idaho's "fiduciary approach" to investor protection may be one way to protect shareholders, but it is an approach Congress rejected.
>
> Idaho's statute is preempted, because the market approach to investor protection adopted by Congress and the fiduciary approach adopted by Idaho are incompatible.[40]

The actions of Chicago Rivet's management vividly illustrate how state takeover statutes may be exploited to delay or defeat a tender offer. In the absence of the state takeover statutes, MITE could have commenced its offer for Chicago Rivet upon filing its Schedule 14D-1 on January 19, 1979. MITE was delayed while it sought a declaration that the Illinois Act was unconstitutional. Chicago Rivet, taking refuge behind the Pennsylvania Act on the asserted ground that its principal place of business was in Pennsylvania, opposed this action by stating that it had no present intention of invoking the Illinois Act. The Secretary of State, consistent with Chicago Rivet's position, stated that he had not decided whether to enforce the Illinois Act (JA-G-4). MITE was further delayed while Chicago Rivet attempted to invoke the Pennsylvania Act in the Pennsylvania state court and before the Pennsylvania Securities Commission. MITE was delayed by Chicago Rivet's and Dixon's subsequent attempts to enforce the Illinois Act against MITE. Only after all

---

[40] *Great Western United Corp.* v. *Kidwell*, 577 F.2d at 1279 (footnote omitted). On the further appeal to this Court three Justices observed that "the very enactment and existence of the Williams Act preempts and invalidates all conflicting state efforts to regulate cash tender offers." *Leroy* v. *Great Western United Corp.*, 443 U.S. at 190.

of these delays, on February 5, 1979, MITE was able to publish its offer in the national edition of the *Wall Street Journal*.

Seventeen days elapsed between the day MITE should have been able to commence its tender offer pursuant to the Williams Act and the day MITE actually commenced its offer. These delays occurred despite the fact that MITE was ultimately not required to comply with either state's statute. Appellant's suggestion that state takeover statutes do not serve the interests of incumbent management is belied by both logic and experience.

The delay which is a necessary result of the Illinois Act's prenotification and hearing provisions does not serve the Williams Act purpose of protecting shareholders as alleged by the state. As the Third Circuit stated:

> During the period of delay, the management may also resort to defensive maneuvers designed to deprive the shareholders of their free choice. Common defensive tactics include arranging a "friendly" merger, increasing dividends, or abolishing cumulative voting. While being subjected to these actions, which are designed to influence their decision, the shareholders cannot enjoy their federally protected right to be informed, or their right to make a choice about the governance of their corporation and the disposition of their shares.

Kennecott Corp. v. *Smith*, 637 F.2d at 189 (footnote omitted). The target's shareholders may additionally suffer by delay because they do not receive interest on the money they would otherwise receive in the offer and could invest during the period of delay. The existence of the Illinois Act and similar state takeover legislation also may serve to discourage tender offers because of the added burdens to be overcome by the bidder, thus harming investors who lose the opportunity to receive tender offer premiums.[41]

---

[41] It has been suggested that defensive maneuvers by target management, although they may benefit some investors by creating an auction atmosphere and a higher price, will ultimately harm investors because, as tender offers

footnote continued

It is clear that the Illinois Act must yield to the Williams Act under the Supremacy Clause.[42] A state scheme which so blatantly conflicts with federal purposes cannot survive constitutional scrutiny.

CONCLUSION

If the appeal is not dismissed as moot, the judgment below should be affirmed for the reasons stated herein.

Dated: August 18, 1981

Respectfully submitted,

RICHARD W. HULBERT
One State Street Plaza
New York, New York 10004
Attorney for Appellees

CHRISTOPHER H. LUNDING
RICHARD L. GELFOND
CLEARY, GOTTLIEB, STEEN & HAMILTON
One State Street Plaza
New York, New York 10004

Of Counsel

---

become more risky and expensive to complete, fewer offers will be made and the aggregate shareholder population will suffer. *See* Easterbrook & Fischel, *The Proper Role of Target's Management In Responding To A Tender Offer*, 94 Harv. L. Rev. 1161, 1174-82 (1981). Moreover, the increased time in which it takes to complete the offer will increase the borrowing costs for the offeror, and thus may reduce the price it will be willing to pay the target shareholders.

[42] The State of New York, as *amicus curiae*, argues that the Illinois Act is not preempted because the Williams Act does not nullify the applicability to tender offers of such other statutes as the Federal Communications Act, 47 U.S.C. § 310 (1976) or the Bank Holding Company Act, 12 U.S.C. §1842 (1976 & Supp. II 1979). New York *amicus* Br. at 9. This argument overlooks the decisive difference that the Supremacy Clause invalidates state law which frustrates congressional enactments but, of course, does not apply to other federal legislation enacted by Congress itself.

APPENDIX A

February 12, 1979

Chicago Rivet & Machine Co.
950 South 25th Avenue
Bellwood, Illinois 60104

Attention: Ralph W. Jindrich,
Chairman of the Board of Directors
President and Chief Executive Officer

Gentlemen:

On February 5, 1979, Mite Corporation through its subsidiary Mite Holdings, Inc. (collectively "Mite") made an offer to purchase any or all stock of Chicago Rivet & Machine Co. ("Rivet") at $28.00 net per share. On February 9, 1979 that offer was amended by raising the price from $28.00 to $30.50 net per share. On February 5, Rivet made an offer to purchase 350,000 shares of its stock at $30.00 net per share. Subsequently, there have been discussions between representatives of Mite and representatives of Rivet during which representatives of Rivet have stated that $30.50 per share was, in the opinion of Rivet's Board of Directors, an inadequate price.

1. Each of Mite and Rivet hereby agrees to withdraw its respective pending tender offer for Rivet stock at or before 10:00 a.m. Eastern Standard Time, February 12, 1979 and not to thereafter purchase any stock of Rivet pursuant to such tender

offer or, in the case of Mite, in any other manner except as hereinafter provided, in consideration of Mite making the following offer:

> Subject solely to the conditions stated in its February 5 offer, amended as shown in Exhibit A attached hereto, on or before March 12, 1979 Mite shall make a cash tender offer for any and all of the stock of Rivet at $31.00 net per share (the "New Mite Offer"), which Offer shall remain open for shareholder acceptance for a period of not less than ten days.

Mite and Rivet further agree as follows:

2. The parties hereto shall negotiate an agreement to merge or otherwise combine Rivet with Mite Corporation or an affiliate of Mite Corporation as soon as practicable after completion of the New Mite Offer, which agreement shall provide, *inter alia*, for a net cash payment to any non-tendering Rivet shareholders of $31.00 per share.

3. Promptly following execution of this Agreement and until March 5, 1979, Rivet shall permit Mite and its officers, employees, agents and representatives access on reasonable notice and during customary business hours to all of Rivet's books, records, properties, plants and facilities and, in this connection, shall request its auditors and attorneys to cooperate with any of Mite's reasonable requests for information (specifically excluding any request for information which is subject to the attorney-client privilege or which constitutes attorney work product). Mite shall keep confidential any and all information received by it or its officers, directors, employees, agents or representatives pursuant to this Paragraph 3, and shall use such information solely for the purposes of evaluating Rivet for the purposes of the transactions contemplated by Paragraphs 1 and 2.

4. The Board of Directors of Rivet will approve the New Mite Offer and recommend its acceptance by all shareholders of Rivet and neither the Board of Directors or officers of Rivet will take

any actions of any kind whatsoever intended to have the effect of preventing or delaying the New Mite Offer.

5. If Mite fails for any reason (other than the pendency of any hearings or investigations by or before any governmental entity) to commence the New Mite Offer on or before March 12, 1979 or to complete the New Mite Offer, Mite hereby agrees that neither it nor any affiliate, as that term is defined in the Rules and Regulations of the Securities and Exchange Commission, will at any time acquire or make any offer to acquire any stock or assets of Rivet or make any offer to merge, consolidate with or otherwise acquire Rivet.

6. On or before February 16, 1979 Mite shall cause (or in the case of Count III of the action pending in the United States District Court for the Northern District of Illinois captioned *Mite Corporation, et al.* v. *Alan J. Dixon, et al.*, No. 79 C 200, use its best efforts to cause) Rivet and the officers and directors of Rivet to be dismissed as defendants with prejudice and without costs in all litigation filed by Mite and currently pending against them and shall deliver to Rivet and its officers and directors general releases of all claims against them arising out of any activities by them occurring on or before the date of execution thereof by a duly authorized officer of Mite. Rivet shall simultaneously therewith cause Mite and/or Wertheim & Co., Inc. and/or Wertheim & Co. and/or their respective officers and directors to be dismissed as defendants with prejudice and without costs in all litigation filed by Rivet and currently pending against them and deliver to all such parties general releases of all claims against them arising out of activities by them occurring on or before the date of execution thereof by a duly authorized officer of Rivet.

7. Until March 12, 1979 (or such earlier date as Mite shall communicate to Rivet a decision in accordance with this letter not to make the New Mite Offer), neither Rivet nor its Board of Directors, officers, employees, agents or representatives (including but not limited to Drexel Burnham Lambert Incorporated) shall solicit or propose or enter negotiations looking toward a

tender offer, merger or other acquisition proposal involving Rivet and any person other than Mite or a subsidiary of Mite.

MITE Corporation.

By [Signed]

R. J. Blinken, Chairman
of the Board of Directors

MITE Holdings, Inc.

By [Signed]

R. J. Blinken, Chairman
of the Board of Directors

Chicago Rivet & Machine Co.

By [Signed]

R. W. Jindrich, Chairman
of the Board of Directors
and President

EXHIBIT A

Conditions

Reference should be made to the Offer to Purchase dated February 3, 1979 for definition of terms used in this Exhibit A not otherwise defined in the Letter Agreement dated February 11, 1979 to which this Exhibit A is attached.

(a) There shall be threatened, instituted or pending any action or proceeding before any court or governmental agency, domestic or foreign, by any government or governmental authority or by any other person, domestic or foreign, challenging the making of the Offer or the acquisition of any Shares by Mite pursuant to the New Mite Offer or otherwise directly or indirectly relating to the New Mite Offer;

(b) There shall have been any action taken or there shall have been any statute, rule regulation or order proposed, promulgated, enacted, enforced or deemed applicable to the New Mite Offer by any government or governmental authority or court, domestic or foreign (including, without limitation, the governmental authorities administering any state tender offer act), that, in the reasonable judgment of Mite, might (i) result in a delay in the ability of Mite to purchase or pay for some or all of the Shares, (ii) render Mite unable to purchase or pay for some or all of the Shares, (iii) make such purchase or payment illegal or (iv) otherwise adversely affect Mite or Rivet or any of their respective subsidiaries or affiliates;

(c) Any change shall have occurred since January 18, 1979 or shall after the date hereof be threatened in the business, assets, liabilities, financial conditions, operations or results of operations of Rivet and its subsidiaries taken as a whole which, in the reasonable judgment of Mite is or may be materially adverse to Rivet and its subsidiaries taken as whole or the value of the Shares, or Mite shall have become aware of any facts or

conditions which, in the reasonable judgment of Mite, have or may have material adverse significance with respect to Rivet and its subsidiaries taken as a whole or the value of the Shares; *provided, however*, that expenses, not exceeding $800,000, incurred on or prior to February 22, 1979 by Rivet in connection with the New Mite Offer, and the prior tender offers for Shares by Mite and Rivet, respectively, shall not be deemed a materially adverse change or to have materially adverse significance to Rivet and its subsidiaries taken as a whole or to the value of the Shares;

(d) There shall have occurred (i) any general suspension of, or limitation on prices for, or trading in, securities on the American Stock Exchange, (ii) a declaration of a banking moratorium or any suspension of payments in respect of banks in the United States or the State of New York or any limitation on the extension of credit by lending institutions in the United States or the State of New York (iii) a commencement of a war, armed hostilities or other international or national calamity directly or indirectly involving the United States or, in the case of any of the foregoing existing at the date hereof, a material acceleration or worsening thereof;

(e) (i) Rivet shall have issued, authorized or proposed the issuance of, additional shares of capital stock of any class or securities convertible into any such shares or rights, warrants or options to acquire any such shares or convertible securities, (ii) Rivet shall have issued, authorized or proposed the issuance of any other securities in respect of, in lieu of, or in substitution for Shares outstanding on January 18, 1979, (iii) Rivet shall have declared or paid any dividend or distribution on any shares of its capital stock other than the regular quarterly dividend at a rate not exceeding $.40 per Share or (iv) Rivet shall have authorized or proposed or announced its intention to propose any business combination with any person (as defined in the Exchange Act) other than Mite, or acquisition of assets, disposition of

assets or material change in its capitalization, or any comparable event, not in the ordinary course of business (other than as contemplated by the New Mite Offer); or

(f) Any person (as defined in the Exchange Act) shall have made or publicly proposed to make, a tender or exchange offer at a price greater than $31.00 per share for some or all of the Shares or shall have publicly disclosed its acquisition of, or shall become known by Mite to have acquired, more than 5% of the outstanding Shares.